

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

CLARENCE WALKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Case No: C 09-2770 SBA

2255 MOT. – See CR 04-40106 SBA

**ORDER DENYING MOTION  
UNDER 28 U.S.C. § 2255**

Dkt. 159, 165, 171

On June 6, 2006, a federal jury convicted Petitioner Clarence Walker of causing the failure to file currency transaction reports (“CTRs”) in violation of the Bank Secrecy Act of 1970, 31 U.S.C. § 5324(a)(1), (d)(1), and of conspiracy to do the same in violation of 18 U.S.C. § 371. On December 4, 2006, the Court sentenced Walker to a term of forty months in custody of the Bureau of Prisons, a three-year term of supervised release and a \$30,000 fine.

The parties are presently before the Court on (1) Petitioner’s Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“2255 Motion”) and (2) Petitioner’s Motion for Judgment on the Pleadings. Dkt. 159, 165. Having read and considered the papers filed in connection with these matters, and being fully informed, the Court hereby DENIES both motions for the reasons set forth below.

**I. BACKGROUND**

Walker was employed by the Internal Revenue Service (IRS) as a revenue agent in its Civil Fraud Group in San Jose, California. The group focused on auditing taxpayers engaged in fraudulent activities. Under federal law, if a financial institution receives or distributes in excess of \$10,000.00 in U.S. currency from an individual or business, it is required to file a CTR with the federal government. Form 8300 is required to be filed by an

1 individual or business when a sale occurs and the seller receives over \$10,000 in cash from  
2 the buyer. Walker's job for the IRS was to educate and monitor check-cashers,  
3 convenience stores, liquor stores and other businesses that cashed checks, to ensure that  
4 they complied with the requirement to file CTRs for all cash transactions over \$10,000.  
5 Two of those stores were Neel's Market and Clyde's Liquors. To perform this oversight,  
6 Walker was required to visit these businesses to educate them about CTR requirements and  
7 to monitor their subsequent compliance. If a business was not complying, Walker had the  
8 authority to refer that business for civil or criminal investigation.

9 Beginning in 2000, the Government began undercover operation "Cyberstorm,"  
10 which focused on the purchase and sale of counterfeit software by Worldwide Services  
11 (WWS), a business owned by Sheila Wu and others. The investigation revealed that  
12 Walker was using his official position with the IRS to assist WWS in its unlawful scheme  
13 by instructing businesses which cashed WWS' checks not to file CTRs. In total, Walker  
14 helped WWS cash over \$400,000 in checks in exchange for a payment of \$30,000.

15 On April 18, 2002, Operation Cyberstorm resulted in the issuance of an indictment  
16 and search warrants and the arrests of Wu and others. After further investigation, Walker  
17 was indicted on June 24, 2004. On September 10, 2004, the Government filed a four-count  
18 Superseding Indictment which charged Walker with: (1) conspiracy to cause the failure to  
19 file CTRs in violation of 18 U.S.C. § 371; (2) causing the failure to file CTRs in violation  
20 of 31 U.S.C. § 5324(a)(1), (d)(1); (3) structuring in violation of 31 U.S.C. § 5324(a)(3),  
21 (d)(1); and (4) bribery in violation of 18 U.S.C. § 201(b)(2)(B) and (C). The matter was  
22 tried to a jury at which Walker was represented by attorney Deborah Levine (Levine).<sup>1</sup>  
23 Dkt. 118. On June 16, 2006, the jury found Walker guilty on Counts One and Two. The  
24 jury was unable to reach verdict on Counts Three and Four, resulting in the Court declaring  
25 a mistrial as to those claims. Id.

26  
27  
28 <sup>1</sup> The other defendants reached plea agreements with the Government.

1 On November 28, 2006, Walker was sentenced by the Court to a term of forty  
2 months in custody, three years of supervised release, a \$30,000 fine and a \$200 special  
3 assessment. Dkt. 129. The Court subsequently entered Judgment against Walker on  
4 December 4, 2006, which Walker appealed to the Ninth Circuit Court of Appeals. Attorney  
5 George C. Boisseau (Boisseau) represented Walker on appeal. On June 23, 2008, the Ninth  
6 Circuit affirmed the judgment in an unpublished disposition. Dkt. 155.

7 On June 22, 2009, Walker filed the instant 2255 motion in which he alleges claims  
8 for ineffective assistance of both his trial and appellate counsel. Dkt. 159. On September  
9 24, 2009, Walker filed a twenty-page memorandum, ostensibly in support of his 2255  
10 motion. Dkt. 163. The Government has filed an opposition to the motion, and Walker has  
11 filed a Traverse. Dkt. 172, 173.<sup>2</sup>

## 12 **II. LEGAL STANDARD**

13 Title 28, United States Code, section 2255 permits federal prisoners to file motions  
14 to set aside or correct a sentence on the ground that “the sentence was imposed in violation  
15 of the Constitution or laws of the United States, or that the court was without jurisdiction to  
16 impose such sentence, or that the sentence was in excess of the maximum authorized by  
17 law, or is otherwise subject to collateral attack.” Where the petitioner does not allege lack  
18 of jurisdiction or constitutional error, relief under section 2255 is inappropriate unless the  
19 alleged error resulted in a “complete miscarriage of justice or in a proceeding inconsistent  
20 with the rudimentary demands of fair procedure.” Hamilton v. United States, 67 F.3d 761,  
21 763-64 (9th Cir. 1995).

---

22  
23  
24  
25 <sup>2</sup> Walker also filed a Motion for Judgment on the Pleadings based on the  
26 Government’s alleged failure to oppose his 2255 motion. Dkt. 167. However, the Court  
27 subsequently granted the Government leave to file a response to the 2255 motion, which  
28 the Government filed on May 18, 2010. Dkt. 172. Based on these developments, Walker’s  
Motion for Judgment on the Pleadings is denied as moot. The Court, however, grants  
Walker’s unopposed request for an extension of time to file his Traverse, nunc pro tunc.  
Dkt. 171.

### III. DISCUSSION

#### A. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

##### 1. Legal Standard

There is a two-prong test applicable to claims for ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 688 (1984). First, the defendant must show “that counsel’s representation fell below an objective standard of reasonableness.” Id.; see also Hasan v. Galaza, 254 F.3d 1150, 1154 (9th Cir. 2001). The defendant must overcome a strong presumption that counsel’s conduct falls within a wide range of reasonable professional assistance which, under the circumstances, might be considered sound trial strategy. United States v. Molina, 934 F.2d 1440, 1447 (9th Cir. 1991). “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 468 U.S. at 687.

To satisfy the second prong, petitioner must establish that he was also prejudiced by counsel’s substandard performance. See Gonzalez v. Knowles, 515 F.3d 1006, 1014 (9th Cir. 2008) (citing Strickland, 466 U.S. at 694). Under Strickland, “[o]ne is prejudiced if there is a reasonable probability that but-for counsel’s objectively unreasonable performance, the outcome of the proceeding would have been different.” Id. Judicial scrutiny of counsel’s performance is “highly deferential.” Strickland, 466 U.S. at 689. A claim for ineffective assistance of counsel fails if either one of the prongs is not satisfied. See id. at 697.

##### 2. Contentions

The Bank Secrecy Act obligates financial institutions to report to the government currency transactions involving more than \$10,000. See 31 U.S.C. § 5313(a). These reports are referred to as Currency Transaction Reports or CTRs. “Financial institution” is defined to include a variety of entities, including “an issuer, redeemer, or cashier of travelers’ checks, checks, money orders, or similar instruments[.]” 31 U.S.C. § 5312(a)(2)(K). In his 2255 motion, Walker argues that neither Neel’s Market nor Clyde’s Liquors are financial institutions within the meaning of the Bank Secrecy Act, and that

1 Levine was ineffective for failing to make such an argument at trial. This contention lacks  
2 merit.

3       According to the sworn declaration of counsel submitted by the Government, Levine  
4 did not dispute the Government's characterization of Neel's Market and Clyde's Liquors as  
5 "financial institutions" for a number of reasons. Gov. Ex. 1, Dkt. 170-1. Levine personally  
6 visited both stores and interviewed their owners, and confirmed that both provided check  
7 cashing services and concluded that they qualified as financial institutions under 31 U.S.C.  
8 § 5312(a)(2)(K). Id. ¶ 5. Counsel also learned from Walker that he performed Title 31  
9 compliance checks on Neel's Market and Clyde's Liquors to ensure their compliance in  
10 various areas, including the submission of CTRs, and that Walker had, in fact, instructed  
11 their employees to ensure their compliance with reporting laws. Id. ¶¶ 6-8. Walker never  
12 told Levine that the stores were not financial institutions; rather, he took the position that  
13 the store owners knew their CTR obligations (because he allegedly trained them well) and  
14 that any failure to do so was attributable to them, not to him. Id. ¶ 11-13. Based on this  
15 information, which is unchallenged by Walker, the Court finds Levine's decision was  
16 objectively reasonable.

17       Though Walker does not confront Levine's declaration directly, he argues that the  
18 Government failed to address his contention that "this court lacked subject matter  
19 jurisdiction or his challenge to the [G]overnment's legal authority to indict him under the  
20 afore [sic] noted statute." Traverse at 4. Walker's arguments, however, are predicated on  
21 his unsupported assertion that Neel's Market and Clyde's Liquors are not financial  
22 institutions subject to the requirements of the Bank Secrecy Act. Moreover, he offers no  
23 evidence to challenge the Government's showing that Levine had a reasonable and good  
24 faith basis for deciding not to dispute the Government's allegation that either store qualified  
25 as financial institutions under the Act. Walker also quibbles with some of the details of  
26 Levine's declaration, though none of his assertions of error undermine the Government's  
27 showing that Levine had a reasonable, good faith basis for her course of action.  
28

1 But even if Walker were able to overcome the presumption that Levine acted with  
2 the requisite level of professional competence, he has otherwise failed to show prejudice—  
3 the second prong of the Strickland test. The evidence at trial, which Walker does not  
4 dispute in his motion, showed that, as a part of his official duties, he was responsible for  
5 ensuring the compliance of Neel’s Market and Clyde’s Liquors’ with their obligation to file  
6 CTRs; that both provided check cashing services; and that Walker cashed checks at both  
7 establishments. Given the substantial evidence demonstrating that both stores were  
8 financial institutions governed by the Bank Secrecy Act, the Court is not persuaded that the  
9 outcome at trial would have been different had Levine challenged whether these stores  
10 qualified as financial institutions. Based on his deficient showing with respect to both  
11 prongs of the Strickland test, the Court rejects Walker’s claim for ineffective assistance of  
12 trial counsel.

13 **B. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

14 **1. Loss Calculation Under U.S.S.G. § 2B1.1**

15 At sentencing, the Presentence Report (PSR) proposed an adjusted offense level of  
16 twenty-six, which included a fourteen level upward adjustment based on an amount of loss  
17 exceeding \$400,000, pursuant to U.S.S.G. § 2B1.1(b)(1)(H). See PSR at 5, Dkt. 163-1.  
18 Walker’s trial counsel objected to the adjustment. She argued that Walker was not  
19 convicted of structuring (as alleged in Count Three), and therefore, the jury did not find that  
20 he had cashed the checks listed in the Indictment relating to the structuring charge.<sup>3</sup>  
21 Counsel thus argued that the evidence at trial did not establish Walker cashed each and  
22 every check alleged in the Indictment which allegedly was necessary to justify the  
23 adjustment.

24 In response to Walker’s contentions, the Government argued that there was ample  
25 evidence to support a finding that the loss attributable to Walker exceeded \$400,000. Dkt.  
26 121 at 4-5. The Government pointed out that the jury found Walker guilty of conspiracy,

27 \_\_\_\_\_  
28 <sup>3</sup> “Structuring” refers to the structuring of a transaction to avoid mandated reporting  
of certain transactions under federal law. See 31 U.S.C. § 5324(a)(3).

1 and that even excluding the checks he allegedly structured from the loss calculation, the  
2 total amount of the checks Walker cashed or attempted to cash was over \$400,000. Id.  
3 Also, the Government argued that the Court heard evidence that Walker cashed or  
4 attempted to cash all of the checks charged in the Indictment. RT at 19:25-21:20. Thus,  
5 the Government argued that a preponderance of the evidence established that the loss  
6 amount was over \$400,000 in checks, which, in turn, supported the PSR's conclusion that a  
7 fourteen level enhancement was proper. Id. After considering the arguments of counsel,  
8 the Court stated: "I do, based upon the evidence that's presented during the course of this  
9 trial, and given the standard that applie[s], I am prepared to make a finding that there is  
10 sufficient evidence in the record to show that it was . . . at least \$400,000." 11/28/06  
11 Reporter's Transcript of Proceedings ("RT"), at 25:18-24, Dkt. 163-1.

12 Walker now contends that his appellate counsel was ineffective based on his failure  
13 to challenge the fourteen level offense adjustment under U.S.S.G. § 1.2B.1. The Strickland  
14 standard applies to claims based on ineffective assistance of appellate counsel. Smith v.  
15 Robbins, 528 U.S. 259, 285 (2000). In Smith, the Supreme Court explained that an  
16 appellate attorney filing a merits brief "need not (and should not) raise every nonfrivolous  
17 claim, but rather may select from among them in order to maximize the likelihood of  
18 success on appeal." Id. at 288. Thus, to establish ineffectiveness of appellate counsel, the  
19 petitioner must demonstrate that "a particular nonfrivolous issue was clearly stronger than  
20 issues that counsel did present." Id.; see Jones v. Barnes, 463 U.S. 745, 751 (1983); Pollard  
21 v. White, 119 F.3d 1430, 1435 (9th Cir. 1997) (noting that a "hallmark of effective  
22 appellate counsel" is to avoid "throwing in a kitchen sink full of arguments with the hope  
23 that some argument will persuade the court.").

24 Here, the Court finds that appellate counsel did not act in an objectively  
25 unreasonable manner in deciding not to challenge the offense level adjustment on appeal.  
26 As an initial matter, Walker has made no showing that this particular issue was "clearly  
27 stronger" than those that appellate counsel chose to present on appeal. In addition, despite  
28 Walker's assertions to the contrary, the Court, in applying U.S.S.G. § 2B1.1(b)(1)(H), did

1 not rely on conduct related to the counts on which Walker was acquitted in calculating the  
2 loss amount. But even if the Court had relied on such evidence, no error would have  
3 occurred. Walker was convicted of conspiracy, which included Walker's attempts to cash  
4 and the actual cashing of checks at Neel's Market and Clyde's Liquors, which, as the Court  
5 recognized at sentencing, exceeded \$400,000. Thus, the mistrial on the structuring charge  
6 did not require the Court to alter its loss calculation. See United States v. Nivin, 952 F.2d  
7 596, 597 (9th Cir. 1991) ("The cumulative loss produced by a common scheme or course of  
8 conduct should be used in determining the offense level, regardless of the number of counts  
9 of conviction.") (quoting U.S.S.G. § 2F1.1 comment 8), overruled in part on other grounds  
10 by United States v. Scarano, 76 F.3d 1471, 1474-77 (9th Cir. 1996). Thus, the Court finds  
11 no merit to Walker's claim that appellate counsel was ineffective by failing to raise this  
12 issue on appeal.

13 **2. Offense Level Adjustment Under U.S.S.G. § 2S1.3(b)(1)(A)**

14 Consistent with the PSR's recommendations, the Court imposed a two-level  
15 enhancement under U.S.S.G. § 2S1.3(b)(1)(A) based on his knowledge that the funds were  
16 proceeds of unlawful activity. PSR ¶ 19. In her sentencing memorandum, Walker's trial  
17 counsel argued that there was no evidence that Walker knew that WWS was engaged in  
18 illegal activity. Def.'s Sentencing Mem. at 9-10, Dkt. 122. The Court, however,  
19 summarily rejected this argument based on the arguments presented in the parties' papers.  
20 RT at 29:20-22.

21 In his 2255 motion, Walker simply repeats the assertion made at sentencing that  
22 there was no evidence that he knew WWS was engaged in illegal activity. However, there  
23 was substantial evidence presented during trial to establish Walker's knowledge. The  
24 record showed, inter alia, that Walker disguised the cash transactions involving WWS,  
25 which he would not otherwise have needed to do if the sales were legal. There also was  
26 testimony from co-defendant Radu Tomescu that Walker frequently was at WWS's office,  
27 and knew about the company's illegal activities. Given the record presented at trial, it  
28

1 would have been frivolous for appellate counsel to challenge the two level enhancement  
2 imposed under U.S.S.G. § 2S1.3(b)(1)(A).

### 3                   **3.       Offense Level Adjustment Under U.S.S.G. § 3B1.3 and Fine**

4           Consistent with the recommendations in the PSR, the Court imposed a two-level  
5 upward adjustment under U.S.S.G. § 2S1.3(b)(2) for using a “special skill,” i.e., his  
6 position with the IRS, to commit the offense. PSR ¶ 22. In addition, the Court imposed a  
7 \$30,000 fine in its Judgment. Walker’s trial counsel did not interpose any objections to  
8 either of these particular determinations. Nonetheless, Walker now claims that his  
9 appellate counsel was ineffective for not raising them on appeal. Not so. Since trial  
10 counsel did not raise any objections to these issues, Walker’s counsel cannot be faulted for  
11 failing to raise defaulted claims on appeal. See United States v. Flores, 172 F.3d 695, 701  
12 (9th Cir. 1999) (holding that the court of appeal would not consider challenge to sentencing  
13 enhancement where he failed to object to it before the district court); Shah v. United States,  
14 878 F.3d 1156, 1162 (9th Cir. 1989) (“The failure to raise a meritless legal argument does  
15 not constitute ineffective assistance of counsel.”) (internal quotations marks omitted).

### 16                   **C.       CERTIFICATE OF APPEALABILITY**

17           Under 28 U.S.C. § 2253(c)(1), an appeal from a final order in a section 2255  
18 proceeding is not permitted unless a circuit justice or district judge issues a certificate of  
19 appealability (“COA”). A COA may issue “only if the applicant has made a substantial  
20 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); see Slack v.  
21 McDaniel, 529 U.S. 473, 483 (2000). “The petitioner must demonstrate that reasonable  
22 jurists would find the district court’s assessment of the constitutional claims debatable or  
23 wrong.” Id. at 484. To satisfy this standard, the petitioner “must demonstrate that the  
24 issues are debatable among jurists of reason; that a court could resolve the issues in a  
25 different manner; or that the questions are adequate to deserve encouragement to proceed  
26 further.” Lambright v. Stewart, 220 F.3d 1022, 1024–25 (9th Cir. 2000) (alteration in  
27 original) (internal quotation marks and brackets omitted). In the absence of a COA, no  
28 appeal of a section 2255 final order may be heard. See 28 U.S.C. § 2253(c). The Court has

1 reviewed the record of this case and finds that the issues are not debatable among jurists of  
2 reason. See Lambright, 220 F.3d at 1024-25. Accordingly, no COA will be issued.


3 **IV. CONCLUSION**

4 For the reasons stated above,

5 IT IS HEREBY ORDERED THAT Walker's 2255 motion and motion for judgment  
6 on the pleadings are DENIED. The Clerk shall close the file and terminate any pending  
7 matters, including but not limited to Docket 159, 165 and 171.

8 IT IS SO ORDERED.

9 Dated: September 27, 2012

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

1  
2 UNITED STATES DISTRICT COURT  
3 FOR THE  
4 NORTHERN DISTRICT OF CALIFORNIA

5 CLARENCE WALKER,

6 Plaintiff,

7 v.

8 USA et al,

9 Defendant.  
10 \_\_\_\_\_/

11 Case Number: CV09-02770 SBA

12  
13 **CERTIFICATE OF SERVICE**

14 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
15 Court, Northern District of California.

16 That on October 1, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said  
17 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
18 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
19 located in the Clerk's office.

20  
21 Clarence Walker  
22 2601 Nuestra Castillo Court  
23 Apt. 2206  
24 San Jose, CA 95127

25 Dated: October 1, 2012

26 Richard W. Wieking, Clerk  
27 By: Lisa Clark, Deputy Clerk  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28